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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DIANE LILE,

Plaintiff and Respondent,

v.

ORIGINAL MEDIA, INC.,

Defendant and Appellant.

E031196

(Super.Ct.No. INC019554)

OPINION

APPEAL from the Superior Court of Riverside County. Arthur S. Block and Robert Gregory Taylor, Judges. Affirmed.

William E. Boyland for Defendant and Appellant.

Law Offices of Christopher J. De Salva and Christopher J. De Salva for Plaintiff and Respondent.

Defendant Original Media, Inc. appeals from a judgment in favor of plaintiff Charles Lile¹ in Lile's action for unpaid wages. We affirm the judgment.

¹ Since the filing of this appeal, plaintiff Charles Lile died. The appeal is being defended by his surviving spouse.

I

PROCEDURAL BACKGROUND

Plaintiff filed a claim against defendant with the Labor Commissioner in March 2000, seeking \$34,000 in wages for the period October 21, 1999, to February 20, 2000. Plaintiff alleged he was the chief financial officer and a director of defendant during that period.

In October 2000, the Labor Commissioner awarded plaintiff nothing on his claim, finding plaintiff had failed to prove his case. Plaintiff appealed the decision to the superior court pursuant to Labor Code section 98.2.

The court heard the appeal as a trial de novo on October 25 and 29, 2001. Plaintiff presented testimony from Philip Sirlin, former chief executive officer of defendant, that Sirlin had authorized the employment of plaintiff until March 2000. According to Sirlin, plaintiff was employed until that time as defendant's chief financial officer, working in excess of eight hours a day.

Defendant, on the other hand, contended it had laid off all its employees in October 1999. According to defendant, any work plaintiff had done thereafter was in his capacity as a director and not as an employee and was not compensable because directors served without pay.²

² Plaintiff did not claim he was entitled to be paid for services as a director.

The court issued its decision on October 30, 2001, in favor of plaintiff. Thereafter, it entered judgment for plaintiff for \$34,000 plus interest, and \$2,500 in attorney fees and costs.³ Defendant appeals from the judgment.

II

DISCUSSION

A. *Denial of Continuance During Trial*

1. *Relevant facts*

Defendant's first contention is that the court erred in denying its motion for a continuance during trial. The relevant facts are as follows.

The first day of trial, Thursday, October 25, 2001, was not reported. However, the record indicates plaintiff presented testimony of himself and Sirlin.

Defendant then presented testimony of David Taylor, a director of defendant. The court, however, struck the testimony. Apparently, the court found Taylor had no personal knowledge of the circumstances under which plaintiff provided services to the company, because he was appointed to the board retroactively and therefore was not a director during the period plaintiff claimed he worked.

³ The award of attorney fees may have been improper under Labor Code section 98.2, subdivision (c), which appears to authorize fees only to parties who successfully *oppose* another party's appeal, not to those who successfully appeal. However, the parties have not addressed this point and we express no opinion on it.

When the trial resumed on Monday, October 29, defendant moved for a continuance to secure the attendance of two additional defense witnesses, Monte Anderson and Wesley Edwards. Anderson was located in Orange County and Edwards in Alberta, Canada. Defendant had served subpoenas on Anderson and Edwards over the weekend, on October 27 and 28, 2001.

Anderson and Edwards had been directors of defendant during the period for which plaintiff claimed compensation. Defense counsel stated Anderson and Edwards could testify that no one had authority on behalf of defendant to employ persons during the period of plaintiff's claim.

Anderson submitted an affidavit stating he was willing to testify, but he had recently been hospitalized and received medical treatment and was unable to travel to court. Counsel for defendant stated orally that Anderson had undergone surgery a week earlier to remove a blood clot from his leg. According to counsel, Anderson would be able to appear in court in seven to 10 days.

Edwards submitted an affidavit stating he was willing to testify, but he lived about 1,800 miles from the court and had a heart condition that required daily medication and prohibited travel of that distance. Edwards also submitted a letter from his physician strongly recommending that he not fly to attend the trial. Defense counsel suggested Edwards could travel to the court by train.

The court noted that neither Anderson nor Edwards was listed on defendant's witness list, and neither witness had been deposed. It also pointed out that defendant could not insure Edwards's appearance even if a continuance were granted, as he was

beyond subpoena range. The court further observed that plaintiff was in poor health too. Counsel for plaintiff stated plaintiff had advanced emphysema and had been on life support equipment. Plaintiff had trouble breathing and was in extreme discomfort while in court.

The court denied a continuance. Defendant then presented testimony of Annie Jackson, Jayne Lanza, and Marcela Livere. Jackson had been the bookkeeper for defendant. As relevant here, she testified that she only saw plaintiff in defendant's corporate offices about five times from September 1999 to March 2000. She also testified that in early October 1999 plaintiff said defendant could not make its payroll, and the employees were free to look for work elsewhere. Shortly after that, most of the employees were hired by a subsidiary of defendant, but plaintiff was not on the subsidiary's payroll. Defendant's board of directors authorized a final payment to Sirlin and his assistant on October 20, 1999, but did not request a check for plaintiff.

Lanza had been an officer and director of defendant from the beginning of 1999 through July 2001. She was chair of the board of directors during 1999 through March 2000. She testified that in September or October 1999 defendant had difficulty meeting its payroll. Sometime between October 5 and 12, the board decided defendant would not have any more employees, and the officers and directors would not take any salary until the company became more secure. Plaintiff was a member of the board at that time and voted in favor of the decision.

Lanza also testified that after October 1999 the board decided Sirlin could no longer hire or fire anyone without board approval.

Finally, Lanza testified that plaintiff was the custodian of defendant's corporate documents from July through November 1999. Some documents had been discovered missing, including some board minutes from September to November 1999. Livere, a former employee of defendant, testified she saw plaintiff take some binders containing documents from his office.

2. *Analysis*

a. *Standard of review*

The grant or denial of a continuance is a matter within the court's discretion. The trial court's decision cannot be disturbed on appeal except upon a clear showing of an abuse of discretion. (*Lazarus v. Titmus* (1998) 64 Cal.App.4th 1242, 1249.)

b. *Good cause for continuance*

Continuances during trial are subject to the standards set forth in California Rules of Court, rule 375 (rule 375). Rule 375(a) provides in part: "Continuances before or during trial in civil cases are disfavored. . . . A continuance before or during trial shall not be granted except on an affirmative showing of good cause under the standards recommended in section 9 of the Standards of Judicial Administration."

Section 9 of the Standards of Judicial Administration (section 9) provides that certain matters "should, under normal circumstances, be considered good cause for granting the continuance of a trial date" Included in those matters is "illness of a party or essential witness" (§ 9, subd. (2)(i).) Therefore, defendant contends, Anderson's and Edwards's unavailability due to their medical conditions constituted good cause for a continuance under rule 375(a).

However, section 9 also provides that, “In general, the necessity for the continuance should have resulted from an *emergency* occurring after the trial setting conference that *could not have been anticipated* or avoided with reasonable diligence” (Italics added.) The alleged emergency in this case was the striking of the testimony of David Taylor. According to defendant, it had intended to have Taylor testify that the board in October 1999 terminated any wages for plaintiff. However, it developed at trial that Taylor had not been a board member when that action was taken.

Defendant does not explain why it could not have inquired before the case was set for trial whether Taylor had personal knowledge of the relevant events. It would have been a simple matter to interview Taylor -- a member of defendant’s board who presumably was a friendly witness -- to insure he could offer competent testimony before relying on him as a trial witness. Had it done so, defendant would have discovered Taylor lacked personal knowledge and could have arranged to have the trial set for a time when Anderson and/or Edwards could attend. Defense counsel knew, at least, of Anderson’s availability and the extent of his knowledge no later than the hearing before the Labor Commissioner in August 2000, more than a year before the trial. Anderson testified at that hearing, and defendant was represented by the same counsel who represented it at trial.

Since we have no transcript of Taylor’s testimony, we do not know whether there might have been some reasonable explanation, not apparent from the record, for defendant’s failure to discover his lack of personal knowledge. But it is an appellant’s burden to provide an adequate record to show error on appeal. (*Stevens v. Owens-*

Corning Fiberglas Corp. (1996) 49 Cal.App.4th 1645, 1657.) We will not presume there was a valid reason for defendant's lack of knowledge absent some basis in the record. Because it failed to show that the situation which led to the need for the continuance could not have been anticipated with reasonable diligence, defendant failed to satisfy the criteria for a continuance under rule 375(a).

c. *Prejudice*

Even where error occurs, "[t]he burden is on the appellant in every case to show that error has resulted in a miscarriage of justice. [Citation.]" (*County of Los Angeles v. Nobel Ins. Co.* (2000) 84 Cal.App.4th 939, 945.) "A miscarriage of justice occurs when it appears that a result more favorable to the appealing party would have been reached in the absence of the alleged errors. [Citations.]" (*Ibid.*)

Here, there is nothing in the record to indicate that Anderson's and Edwards's proposed testimony would have resulted in a better outcome for defendant.

Defendant contends the testimony would have been extremely critical and probably dispositive of the issue at trial, i.e., whether plaintiff was an employee of defendant during the time for which he claimed wages. However, defendant does not explain what Anderson's and Edwards's proposed testimony would have added. Lanza had already testified that plaintiff had agreed to waive his salary. Testimony to the same effect from Anderson and Edwards would have been merely cumulative.

In fact, defendant appears to acknowledge that Anderson's and Edwards's proposed testimony would have duplicated Lanza's. As defendant states: "*other than the testimony of Ms. Jayne Lanza, Mr. Wes Edwards and Mr. Monte Anderson are the only*

two other witnesses who could testify to the actions taken by the board in October 1999 which specifically terminated any wages for Mr. Charles Lile -- the critical issue in this case.” (Italics added.)

Notwithstanding Lanza’s testimony that plaintiff agreed to work without pay, the court chose to credit the testimony of Sirlin and plaintiff, that plaintiff was to be paid his regular salary. It appears from the record that the case merely boiled down to a question of whose testimony the court found more credible. It is not reasonably likely that calling Anderson and Edwards to say the same thing Lanza had said would have made any difference.

Defendant notes that Lanza testified Edwards took notes of all of the meetings. However, defendant makes no contention that, if called as a witness, Edwards would have been able to produce documentary evidence that plaintiff agreed to work without pay. Similarly, defendant suggests plaintiff might have destroyed documents showing that the board terminated all employees’ salaries but makes no assertion it would have been able to prove plaintiff destroyed documents had a continuance been granted. Again, even if defendant had shown good cause for a continuance, the failure to grant one was not a miscarriage of justice.

d. *Telephonic or videotape testimony*

Defendant notes that, as an alternative to a continuance, defense counsel offered to have Anderson and Edwards testify by telephone or videotape. Whether to allow telephonic testimony is a matter of discretion. (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1176.) Telephonic testimony would have deprived the court and counsel of the

opportunity to observe the witnesses' demeanor and to show them documents while examining them. Perhaps it would have been reasonable to overlook those disadvantages if the need for the witnesses' testimony had truly been unforeseeable. But given defendant's failure to offer a reasonable explanation for not discovering the problem with Taylor's testimony in a timely fashion, the court did not abuse its discretion in not permitting telephonic testimony.

Video testimony would have permitted observation of the witnesses' demeanor, but it would have delayed the proceedings while videotaping arrangements were made and the equipment procured and set up. The court had already expressed its concern about delaying the trial in view of plaintiff's precarious health. Again, given defendant's failure to offer a reasonable excuse for its predicament, the court did not abuse its discretion in not permitting video testimony.

B. *Validity of Trial Court's Findings and Conclusions*

Defendant's remaining contention is that the court made incorrect statements in paragraphs 3 and 5 of its findings and conclusions. Paragraph 3 stated: "Plaintiff's witness, Philip Sirline [*sic*] testified that he was CEO & President of defendants [*sic*] corporation and authorized employment of plaintiff Charles Lile until his termination by the Board of Directors on March 9, 2000. There is no credible evidence to the contrary."

Paragraph 5 stated: "There was no evidence presented by defendant to contradict Philip Sirline's [*sic*] authority to hire & manage employees, nor to support plaintiffs [*sic*] dismissal prior to 03/09/00."

Defendant argues that in fact there was evidence contradicting Sirlin's testimony and his authority to employ plaintiff. As stated, Lanza testified that the board decided defendant would not have any more employees, the officers and directors would not take any salary, and Sirlin could not hire anyone without board approval. Therefore, defendant concludes, paragraphs 3 and 5 were inaccurate.

We fail to see the significance of defendant's argument. Factual issues on appeal from a trial court decision reviewing a Labor Commissioner ruling are reviewed under the substantial evidence standard. (*Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 561.) Under that standard, when the evidence is in conflict, the appellate court must uphold the findings of the trial court. (*Ibid.*) Therefore, even if the court was incorrect in asserting there was no evidence conflicting with Sirlin's testimony, the only relevant question on appeal is whether there was substantial evidence to support its findings.

Viewed in the light most favorable to plaintiff (*Nordquist v. McGraw-Hill Broadcasting Co., supra*, 32 Cal.App.4th 555, 561), the evidence sufficiently supported the court's findings. Lanza's claim that plaintiff was not employed by defendant during the relevant period was undermined by the fact -- established by her own testimony -- that plaintiff was the custodian of defendant's corporate documents for part of that time. Also, Lanza did not explain why, if plaintiff was not employed by defendant, the board passed a resolution to "dismiss" plaintiff in March 2000. Even if these inconsistencies in defendant's evidence were overlooked, the court was free to credit plaintiff's evidence and reject defendant's. At the least, with no transcript of plaintiff's evidence, defendant

has failed to produce an adequate record to show the court's findings were not supported by substantial evidence.

III

DISPOSITION

The judgment is affirmed. Respondent shall recover costs on appeal.

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RICHLI
J.

We concur:

RAMIREZ
P.J.

HOLLENHORST
J.